2004

State of Utah v. Pete Floor : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
PETE FLOOR,	:	Case No. 20040779-CA
Defendant/Appellant,	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Annotated section 58–37-8(2)(a)(i) (Supp. 2004), and possession of a firearm by a user of controlled substances, in violation of Utah Code Annotated subsections 76-10-503(1)(b)(iv) and (3)(a) (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, presiding. The trial judge stayed the imposition of Appellant Pete Floor's sentence and he remains released pending the outcome of this appeal. Mr. Floor requests this Court to schedule this appeal for oral argument as provided for under Utah Rule of Appellate Procedure 29(a).

KENT R. HART (6242)
RALPH DELLAPIANA (6861)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, UT 84111
Attorneys for Appellant

MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Appellee

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KENT R. HART (6242)
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MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorney for Appellee

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment of conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Annotated section 58-37-8(2)(a)(i) (Supp. 2004), and possession of a firearm by a user of controlled substances, in violation of Utah Code Annotated section 76-10-503(1)(b)(iv) and (3)(a) (2003). This Court has jurisdiction over criminal convictions other than first degree felonies. Utah Code Annotated § 78-2a-3(e) (2002).

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ARGUMENTS

1. The reasonableness requirement under the Fourth Amendment to the United States Constitution requires the police to knock and announce their purpose and presence and then to wait a reasonable time before entering when executing search warrants. In

this case, two plain clothes police officers engaged Mr. Floor's wife in conversation at the threshold of Mr. Floor's residence without disclosing their identities or purpose. Upon announcing that they were police officers serving a search warrant, the officers immediately entered the residence when they saw Mr. Floor's wife move a half or full step backwards. Did the police officers' failure to wait a reasonable time before entering constitute an illegal search?

In reviewing the denial of a motion to suppress, this Court reviews the trial court's factual determinations for clear err and its legal conclusions for correctness. State v. Ribe, 876 P.2d 403, 405 (Utah Ct. App. 1994). Mr. Floor preserved his arguments for appellate review by raising them in his motion to suppress and at the suppression hearing. R. 42-53; 129.[1]

2. This Court has ruled that a violation of the knock-and-announce rule does not necessarily require the suppression of evidence. But, this Court made that ruling before the United States Supreme Court held that the Fourth Amendment constitutionally requires the police to knock, announce their presence and purpose, and then wait a reasonable time for a response. Because the police officers' failure to wait violated fundamental constitutional rights, was the trial judge required to suppress the fruits of the illegal entry?

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[1]The transcript numbered 129 contains the record of the suppression hearing. The internal page numbers of that volume are included after "R. 129."

Determining whether the state or federal constitutions require the suppression of evidence presents a question of law which this Court reviews for correctness. State v. Deherrera, 965 P.2d 501, 503 (Utah Ct. App. 1998). Defense counsel requested the trial judge to suppress the evidence. R. 42-53, 129: 31-33. Because the trial judge found no constitutional violation, he had no occasion to address the suppression issue.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Addendum contains the following judgment, statute, and constitutional provisions:

Addendum A:	Judgment, August 16, 2003
Addendum B:	Utah Code Ann. § 77-23-210 (2003)
Addendum C:	Utah Const. art. I, § 14
Addendum D:	United States Const. Amend. IV

STATEMENT OF THE CASE

On November 20, 2003, the State filed an Information accusing Mr. Floor of possession of a controlled substance, child endangerment, possession of a firearm by a person using drugs, and possession of drug paraphernalia. R. 1-3. Mr. Floor waived his right to a preliminary hearing and, instead, filed a motion to suppress evidence that the police obtained as the fruits of an illegal search. R. 35, 42. The trial judge held a hearing on the motion and denied Mr. Floor's request to suppress the evidence. R. 71-74, 129: 35-37.

Mr. Floor then agreed to plead guilty to possession of a controlled substance and possession of a firearm by a person using drugs. R. 76, 84. As part of the plea agreement, Mr. Floor reserved his right to appeal the denial of his motion to suppress. R. 76. On August 16, 2004, the trial judge sentenced him to concurrent terms of up to five years each but suspended the sentences and placed Mr. Floor on probation for 36 months. R. 90-92.

Three days after sentencing, Mr. Floor filed a motion to stay the imposition of sentence and petitioned the trial judge for a certificate of probable cause that he was likely to prevail on appeal. R. 96, 98. The State stipulated to Mr. Floor's requests. R. 109. On August 30, 2004, the trial judge stayed Mr. Floor's sentence and certified that this appeal presented a "substantial question of law that may result in reversal." Id. at 109-10. Mr. Floor filed a timely notice of appeal the next day. R. 113.

STATEMENT OF THE FACTS

In late 2003, Salt Lake City police obtained a warrant to search a residence located in the avenues area of the city. R. 129: 4. Mr. Floor occupied the residence with his wife Connie. Id. at 5, 8. The police were investigating possible drug activity at the residence. Id. at 4-5. In requesting the warrant, the police had no specific concerns about the possible presence of weapons. Id. at 20-21. Nor, did the police fear that announcing their purpose before serving the warrant would risk the destruction of evidence. Id.

Accordingly, the police requested and obtained a knock-and-announce warrant which required them to alert the occupants before entering the residence that they were police officers serving a search warrant. Id. at 8, 21.

At 6:45 p.m., on November 11, 2003, police detectives Doug Teerlink and Steve Cutler, together with eight or nine SWAT team members, served the warrant. Id. at 5, 9. Detectives Teerlink and Cutler actually served the warrant while the SWAT team hid by the side of the house out of sight. Id. at 10-11. The detectives were dressed in plain clothes while the SWAT team wore black police uniforms complete with weapons, headgear, and "Police" printed on both the front and back of their uniforms. Id. at 5, 9.

As the detectives approached the front door, they saw that a glass screen door was closed but that the inner door was open. Id. at 5. At the door, they saw Connie standing just inside the residence. Id. Connie opened the screen door and assumed that the two plain-clothed men had come to ask her about her dog that she had advertised was missing. Id. Connie then asked the two men about her lost dog. Id. Without identifying themselves, the detectives perceived Connie's assumptions about their presence and inquired about the missing dog. Id.

After engaging in this conversation, Det. Cutler thought he heard someone behind him whisper, "Come on, let's go." Id. at 17. The detectives then brandished their guns and Det. Cutler displayed his police badge as Det. Teerlink announced that the men were police officers serving a search warrant. Id. at 6, 8, 13-14, 17. Det. Cutler attested that

"[a]s [Det. Teerlink] made the announcement," Connie "took a half step or a step back." Id. at 17. Det. Teerlink conceded that once he saw Connie move backwards, he "went in immediately[,] didn't wait any longer," and grabbed hold of Connie's arm. Id. at 15. Connie reamined within arms length of the door as shown by Det. Teerlink's statement that he grabbed Connie while he "essentially" remained on the porch. Id. at 13.

Det. Teerlink explained that his "concern was that she would be retreating into the residence to destroy evidence." Id. at 7. Det. Cutler agreed that as recently as the last month and-a-half he had served searched warrants when the occupants had destroyed evidence before the police could enter the residence. Id. at 18. He also stated that the police were "always concerned about the gun issue, especially with the various narcotics that were being sold or used in the residence. . . ." Id.

When Det. Teerlink grabbed Connie, Mr. Floor appeared two or three steps behind Connie, grabbed her by the waist from behind, and tried to pull her inside the house. Id. at 6-7, 17. Det. Cutler then grabbed Det. Teerlink. Id. at 17-18. When Det. Cutler saw the SWAT team coming up the stairs to the front door, he let go of Det. Teerlink causing both the detective and Connie to fall to the ground. Id. at 18-19. Det. Cutler then held the door for the SWAT team to enter. Id. at 19.

The SWAT team leader, Officer Michael Burbank, entered the residence, pushed Mr. Floor back, identified himself, and ordered him to put his hands up. Id. at 28. Mr. Floor immediately complied and submitted to Officer Burbank. Id. at 28-29. The police

searched the residence and found a woman named Jean O'Shea in a back bedroom. R. 4. In the bedroom, the police found .6 grams of cocaine, four guns, ammunition, and pictures of the three occupants holding the guns. Id. In a separate bedroom and in the front room, the police found drug paraphernalia. Id. The police interviewed all three occupants and each of them admitted to using cocaine. Id.

The State filed an Information accusing Mr. Floor of possession of a controlled substance, child endangerment, possession of a firearm by a person using drugs, and possession of drug paraphernalia. R. 1. The child endangerment charge was based on Mr. Floor's statement that Connie's daughter occasionally slept overnight at the residence. R. 4. Mr. Floor waived his right to a preliminary hearing and filed a motion to suppress the evidence of drug usage. R. 35, 42. He claimed that the police violated his right to be free from unreasonable searches and seizures when they entered his home without waiting for the occupants to respond to the police officers' announcement of a search. R. 46-47.

At a hearing on the motion, Det. Teerlink testified that when Connie moved backwards he did not see her try to throw away evidence or grab any objects. R. 129: 13. Det. Cutler agreed that he saw no sign of anyone trying to destroy evidence or grab a weapon. Id. at 21. Det. Cutler also admitted that the police had no grounds for requesting a no-knock search warrant because they only had "limited" information about the drug activity at the residence. Id. at 21.

Det. Cutler discounted defense counsel's suggestion that Connie may have stepped back to let the police inside the house. Id. at 21-22. Det. Cutler stated that he "didn't see it that way. Not where we'd been having a conversation with her initially about the dogs and stuff, anyway, everything seemed to be fine." Id. at 22. Finally, none of the police officers who testified witnessed any damage to Mr. Floor's residence. Id. at 15, 22-23, 29.

The trial judge orally denied the motion to suppress. In his findings, he ruled that Connie's step backwards didn't "bother [him] as much as at the time that she backed up, the officer grabbed her arm and he readily admits, to hold her; but then Mr. Floor got up, the defendant, and grabbed her and tried to pull her back in." Id. at 34. He concluded that when "Connie, the female, started to retreat [and] the defendant grabbed her" officer safety became an issue. Id. at 35. In reaching this conclusion, the trial judge reasoned that the police do not "have to wait at that point, let this person retreat out of sight or wherever they're going to retreat to and then come back and open the door. I think that officers' safety becomes a paramount issue. . . ." Id. at 35-36. The trial judge added that "if the Court of Appeals wants to become this specific as to a knock and announce warrant . . . then they are going to have to make that decision." Id. at 36.

In his written order denying the motion, the trial judge ruled that "[e]xigent circumstances allowing entry into the residence arose when [Connie] and Defendant retreated into the residence." R. 73. He specifically found that when Det. Teerlink

announced that the police were serving a search warrant, Connie "responded by attempting to retreat into the residence." R. 72. Further, the judge repeated his conclusion that "Detective Teerlink's initial entry into the home was due solely to the action of Defendant pulling Barnett and therefore, Teerlink, into the residence." R. 73.

Following this ruling, Mr. Floor agreed to plead guilty to possession of a controlled substance and possession of a firearm by a person using drugs. R. 76, 84. But, he also reserved his right to appeal the denial of the motion to suppress. R. 76. Following sentencing, Mr. Floor filed a motion to stay the imposition of sentence and petitioned the trial judge for a certificate of probable cause that he was likely to prevail on appeal. R. 96, 98. The State stipulated to the granting of the stay. R. 109. The trial judge issued a certificate of probable cause and ruled that "there is a substantial question of law that may result in reversal" on appeal. Id. This appeal followed. R. 113.

SUMMARY OF THE ARGUMENT

Under the Fourth Amendment to the United States Constitution, police officers may only dispense with the knock-and-announce rule when they have a reasonable suspicion that knocking, announcing, or waiting would endanger the police, be futile, or inhibit the police investigation such as through the destruction of evidence. The trial judge erred in ruling that Mr. Floor's attempt to pull Connie inside the home justified the officers' forcible entry. Even viewing the evidence in the most favorable light, Mr.

Floor's actions played no role in the officers' decision to enter. In assessing whether exigent circumstances support a forcible entry, courts may only rely on those circumstances existing at the time of entry as opposed to Mr. Floor's post-entry response.

The only remaining circumstance that could possibly excuse the officers' failure to wait was Connie's half or full step backwards. At best, Connie's step was ambiguous, presented no safety concerns, and raised no risk about the possible destruction of evidence. Her minor movement was equally consistent with her submitting to the police and allowing them to enter the house. The trial judge confused the law on the knock-and-announce rule in claiming that Connie's step was sufficient to raise safety concerns.

Further, the record provides no support for concluding that Connie's actions posed a danger to the police or suggested that she would destroy evidence. Courts agree that the mere nature of drug crimes does not, in itself, endanger police or create a reasonable suspicion that evidence may be destroyed if the police follow the knock-and-announce rule. Further, the officers in this case had no specific concerns for their safety or about the destruction of evidence other than their general worries in executing any other search warrant. Case law firmly supports these conclusions.

With particular respect to the potential for destroying evidence, the United States Supreme Court recently held that the knock-and-announce rule requires the police to identify specific circumstances that show how waiting a reasonable time would risk imminent destruction. For example, the police must be familiar with the inside of the

place to be searched or know that drugs are stored near a sink or toilet. The police in this case conceded that they had no specific knowledge to support any concern for the destruction of evidence. Further, the State presented no evidence that Connie's short step backwards was connected to the possible destruction of drugs in any way. Courts have found no exigency under similar circumstances.

Although both this Court and the Utah Supreme Court have not required suppression for illegal but non-constitutional police conduct, their conclusion was based on their assumption that the knock-and-announce rule was not constitutionally required. Subsequent to these rulings, the United States Supreme Court held that the Fourth Amendment embodies the common law knock-and-announce rule. Because, that rule falls within the fundamental right to be free from unreasonable searches and seizures, violations of the knock-and-announce rule require suppression.

Even under this Court's existing analysis for assessing whether suppression is warranted, the trial judge below should have suppressed the fruits of the illegal search. Because the police officers had no specific safety concerns and did not suspect the destruction of evidence, they violated Mr. Floor's Fourth Amendment rights. This Court has ruled that the denial of that fundamental right requires suppression.

Further, the police officers' illegal entry directly implicated the concerns supporting the knock-and-announce rule. The police officers' entrance into Mr. Floor's house, grabbing his wife absent exigent circumstances, and then storming the residence

with a SWAT team violated Mr. Floor's privacy interests in his dwelling. Likewise, the police officers' illegal entry and their subsequent scuffle with Connie and Mr. Floor resulted in the primary evil that the knock-and-announce rule seeks to avoid: the risk of violence and physical injury. Finally, the absence of justification for the forcible entry constitutes a clear Fourth Amendment violation that requires suppression.

ARGUMENT

The trial judge erred in ruling that Connie's short step backwards and Mr. Floor's attempts to protect her justified Det. Teerlink in immediately entering the residence and grabbing Connie. Connie's minor movement was, at best, ambiguous and did not create any safety concerns or even hint that she was retreating to destroy evidence. Mr. Floor's effort to pull Connie inside the house provided no exigency for entering the house because the police first entered illegally without waiting a reasonable time. No other exigency supported the police officers' forcible entry. The police admitted that they had no specific concerns for their safety or the destruction of evidence. And, the inherent nature of drug investigations provides no support for the officers' illegal conduct. Finally, the police officers' illegal entry requires suppression because it violated Mr. Floor's fundamental right to be free from unreasonable searches. Even if the Fourth Amendment did not control, the interests supporting the knock-and-announce rule demand suppression.

I. A SMALL STEP BACKWARDS PROVIDES NO JUSTIFICATION FOR THE POLICE TO DISPENSE WITH THEIR CONSTITUTIONAL DUTY TO WAIT A REASONABLE TIME FOR A RESPONSE WHEN SERVING SEARCH WARRANTS

Neither safety concerns nor the possible destruction of evidence supported the police officers' failure to wait a reasonable time before entering Mr. Floor's residence. In serving search warrants, the state and federal constitutions require police officers to announce their authority and purpose and then to wait a reasonable time for a response before forcibly entering a residence. The police may only dispense with these requirements if exigent circumstances require immediate entry. But, here the only evidence to support the police officers' failure to wait was Connie's short step backwards. That minor ambiguous act neither indicated a safety concern nor risked the destruction of evidence to support the officers' entry below.

A. Common Law and Constitutional Principles Have Long Required Police Officers to Announce Their Presence and Authority and Then To Wait a Reasonable Time For a Response Absent Specific Exigent Circumstances.

Both the Utah Constitution and the Fourth Amendment to the United States Constitution guarantee all persons the right to be free from unreasonable searches and seizures. U.S. Const. amend IV; Utah Const., art. I, § 14. This right encompasses the common law principle that generally requires the police to "announce [] their presence

and authority prior to entering" a building when serving search warrants. Wilson v. Arkansas, 514 U.S. 927, 931 (1995). These requirements, known as the "knock and announce" rule, mandate that the police wait "a reasonable period of time" before entering. State v. Ribe, 876 P.2d 403, 413 (Utah Ct. App. 1994). To hold otherwise, would render the rule "meaningless." Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

Although the knock-and-announce rule falls within the constitution's reasonableness requirement for searches, that principle "was never stated as an inflexible rule requiring announcement under all circumstances." Wilson, 514 U.S. at 934. The obligation to announce and wait "gives way when officers 'have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would . . . inhibit the effective investigation of the crime by, for example, the destruction of evidence.'" United States v. Banks, 540 U.S. 31, 36 (2003) (quoting Richards, 520 U.S. at 394). Likewise, magistrates may issue a no-knock warrant if the police can show beforehand that similar circumstances exist. Id. Utah has codified these principles in Utah Code Annotated section 77-23-210 (2003); Addendum B.

In reviewing the denial of a motion to suppress, this Court reviews the trial court's factual determinations for clear error and its legal conclusions for correctness. Ribe, 876 P.2d at 407. "The assessment of whether reasonable suspicion exists is an objective standard based on the totality of the circumstances in which an 'officer is entitled to

assess the facts in light of [his or] [her] experience' because 'a trained law enforcement officer may be able to perceive and articulate meaning in a given conduct which would be wholly innocent to the untrained observer.'" State v. Struhs, 940 P.2d 1225, 1228 (Utah Ct. App. 1997) (quoting State v. Trujillo, 739 P.2d 85, 88-89 (Utah Ct. App. 1987)). But, "[w]hen a case involves the reasonableness of a search or seizure, [this Court] 'afford[s] little discretion to the district court because there must be state-wide standards that guide law enforcement and prosecutorial officials.'" State v. Warren, 2003 UT App 36, ¶12, 78 P.3d 590 (quoting State v. Hansen, 2002 UT 125, ¶26, 63 P.3d 650).

B. The Trial Judge Erred in Relying on Mr. Floor's Post-Entry Actions Because the Only Possible Circumstance That Even Suggests An Exigency Was Connie's Innocuous Step Backwards.

Because the police immediately entered Mr. Floor's residence without waiting for him or Connie to respond, their entry was only justified if they had a reasonable suspicion of danger, futility, or the destruction of evidence. Banks, 540 U.S. at 36. The trial judge concluded that officer safety justified the failure to wait. R. 73-74; 129: 35-36. But, even viewing the trial judge's findings in the most favorable light possible, no evidence supports the trial judge's conclusions. State v. Hechtle, 2004 UT App 96, ¶2, 89 P.3d 185. The trial judge clearly erred in concluding that officer safety arose "due

solely to the action of Defendant pulling Barnett and therefore, Teerlink, into the residence." R. 73. In determining "the reasonableness of the officers' decision" to enter Mr. Floor's house, the trial judge's inquiry was limited to the reasonableness "as of the time they entered." Richards, 520 U.S. at 395. In other words, a reasonable suspicion must support the entry "at its inception," United States v. Clay, 640 F.2d 157, 159 (8th Cir. 1981), as opposed to "justifications after the fact." Ribe, 876 P.2d at 415; see also Mazepink v. State, 987 S.W.2d 648, 655 (Ark. 1999), cert. denied 528 U.S. 927 (1999) (reasonableness inquiry limited to decision "at the time of [] entry").

Contrary to these principles, the trial judge extended the inquiry beyond the time of the initial entry when Det. Teerlink reached across the threshold and grabbed Connie. Det. Teerlink did not initially enter the residence based on anything that Mr. Floor did. Both detectives testified that they first noticed Mr. Floor after Det. Teerlink had entered the house and grabbed Connie. R. 129: 6-7, 17. Thus, Mr. Floor's attempt to pull Connie inside the house played no role in Det. Teerlink's decision to grab Connie. Allowing the police to rely on "justifications after the fact" to support a search would allow the police to create an exigency when none actually existed in violation of search and seizure principles. Ribe, 876 P.2d at 415.

Excluding the trial judge's erroneous reliance on Mr. Floor's actions leaves Connie's "half step or a step" backwards as the only remaining justification for dispensing with the police officers' duty to wait before entering the house. R. 129: 17.

The trial judge found that when Det. Teerlink announced that the police were serving a search warrant, Connie "responded by attempting to retreat into the residence." R. 72. But, the trial judge clearly erred in characterizing Connie's small step as retreating. Ribe, 876 P.2d at 405. Such an ambiguous gesture provides no basis for concluding that waiting for further response "would be dangerous" to the police officers. Richards, 520 U.S. at 394. Connie's movement was obviously minimal because Det. Teerlink admitted that he grabbed her while he "essentially" remained outside the front door. R. 129: 13. Thus, despite Connie's half-step or step backwards, she remained within arm's length of the police officers.

Defense counsel illustrated the ambiguity of Connie's reaction by noting that the small step raised the obvious inference that she was submitting to the police officers' authority and was allowing them to enter the house. R. 129: 22. A lone step backwards "offer[s] no threat" to police officers absent additional suspicious facts. United States v. Rideau, 969 F.2d 1572, 1575 (5th Cir. 1995); see also Hechtle, 2004 UT App 96, ¶15, 89 P.3d 185 (although the presence of agents that mask smells and the condition of defendant's eyes were "suggestive of possible drug use, they do not alone create probable cause."). The officers' reaction was particularly unreasonable given that the burden to wait for further information was "'certainly slight.'" Park v. Commonwealth, 528 S.E.2d 172, 175 (Va. Ct. App. 2000) (quoting Miller v. United States, 357 U.S. 301, 310 (1958)).

The trial judge's oral decision demonstrates his confusion about the knock-and-announce rule. First, he characterized Mr. Floor's position as being overly "specific as to a knock and announce warrant." R. 129: 36-37. Instead, he deferred to this Court to rule differently. Id. Rather than Mr. Floor advocating an overly ritualistic position, requiring the police to announce their presence and to wait a reasonable time is "'embedded in Anglo-American'" constitutional and common law. Wilson, 514 U.S. at 934 (quoting Miller, 357 U.S. at 313). Contrary to the trial judge's understanding, Mr. Floor's motion to suppress was firmly grounded in the law.

Further, the trial judge expressed some doubt about his understanding when he invited this Court to provide more "specific" direction. R. 129: 36. He also stayed the sentence and certified that the case presented a "substantial" question for this Court. R. 109. The trial judge had good reason to question the soundness of his decision. His judge's ruling that a simple step backwards justified dispensing with police officers' duty to wait a reasonable time effectively renders the knock-and-announce requirement "meaningless." Banks, 540 U.S. at 41.

C. The Police Officers' General Safety Concerns Provided No Support For Concluding That Connie Posed a Danger.

The police officers' suspicions that they would find drugs at the residence provided no support for suspecting that Connie's step posed a danger. The United States

Supreme Court has rejected an exception to the knock-and-announce rule for any category of crime based solely on the inherent dangerousness of the activity being investigated. Richards, 520 U.S. at 394. Doing so would "insulate[]" warrants from judicial review and essentially eliminate the knock-and-announce rule. Id. at 393-94; see Mazepink, 987 S.W.2d at 655; Park, 528 S.E.2d at 177.

In any event, review by a magistrate is needed in each case to determine whether warning the occupants would reduce or increase the danger to both the police and occupants. Because "not every drug investigation will pose" risks to law enforcement, each case must be judged on its own merits. Richards, 520 U.S. at 393. In fact, the need to alert occupants of police presence may be even greater when investigating inherently dangerous criminal activity: "the necessity that police provide notice of their presence seems more compelling in the face of startling someone in possession of a weapon." People v. Martinez, 513 N.E.2d 607, 610 (Ill. App. Ct. 1987), cert. denied 488 U.S. 868 (1988).

Thus, even if courts could assume that the presence of drugs increases the likelihood of violence, a neutral magistrate must review each case individually. Richards, 520 U.S. at 393. Then, if the State has evidence that announcing the police presence would endanger officers, it can present that evidence to a magistrate. But, ultimately, the magistrate and reviewing courts have the duty "to determine whether the facts and circumstances . . . justified dispensing with the knock-and-announce

requirement." Id. at 394.

In this case, for example, the detectives conceded that they had no specific concerns about possible violence or the presence of weapons. Id. at 6, 20-21. In fact, because the police had only "limited" information, they had no basis for even requesting a no-knock search warrant. Id. at 21. Thus, it would be disingenuous for the State to claim that this case presented anything other than a routine search for evidence.

This case is analogous to United States v. Clay in which the Court of Appeals for the Eighth Circuit ruled that responding to police authority by taking two steps backwards did not even suggest any safety concern. 640 F.2d at 158. In that case, the police searched a residence for drugs and weapons. Id. During the search, the defendant knocked on the front door. Id. A plain clothes officer opened the door, displayed his badge, and ordered the defendant inside the house. Id. The defendant immediately took one or two steps backwards. Id. at 158, 160. The plain clothes officer repeated his command and the defendant entered the house and submitted to a search. Id. at 158.

The Eighth Circuit ruled that the defendant's "conduct alone was not suspicious under the circumstances:"

> [Defendant] merely hesitated and took a step or two backwards (but did not turn around) when confronted at the door by an armed man in plain clothes from inside his cousin's house. The government's emphasis that appellant's "hesitancy" created individualized suspicion falls far short of those cases dealing with flight, furtive gestures, or otherwise inexplicable sudden movements toward a pocket or other place where a weapon could be concealed. Thus, appellant's action in stepping

backwards did not justify the search.

Id. at 160 (footnotes omitted). Similarly, Connie's ambiguous movement did not suggest that she had a weapon or posed a safety risk.

D. No Evidence, Other Than General Concerns Common to Any Drug Investigation, Supported the Possible Destruction of Evidence.

Similar to general safety concerns, ordinary fears that drug users or dealers may destroy evidence do not support reasonable suspicion absent specific information supporting those fears. Like the possible presence of weapons, "'where the only exigent circumstance is that the object of the search is drugs, which by their nature are readily disposable, officers may not, without more, dispense with the need to wait a reasonable time for the occupants to respond before making a forced entry.'" Park, 528 S.E.2d at 177 (quoting Hargrave v. Commonwealth, 464 S.E.2d 176, 179 (Va. Ct. App. 1995)). Here, the police officers conceded that they had no specific concerns that announcing their presence and purpose before serving the warrant risked the destruction of evidence. Id. at 20-21. Instead, all of the evidence indicates that this case presented a routine service of a search warrant.

Connie's half-step or step backwards provided no grounds for elevated concerns for destroying evidence. The United States Supreme Court recently clarified that the police may only forego waiting a reasonable time after announcing their presence and

purpose when the delay addresses "the particular exigency claimed." Banks, 540 U.S. at 40. Thus, "when circumstances are exigent because a [drug] pusher may be near the point of putting his [or her] drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter." Id. With particular respect to serving a search warrant for drugs, the police officers' concerns must be rooted in the "opportunity" to destroy drugs such as in a "bathroom" or "kitchen." Id.

Applying these principles to the facts of this case, Connie's small step backwards presented no "opportunity" for her to destroy evidence. Id. The State presented no evidence that the drugs were located near a sink or toilet or that Connie's minor movement otherwise made disposal "imminent." Id. "Without the benefit of further evidence, such as the location of the bathroom in relation to the bedroom[s] [or the front room] where the drugs were kept, any determination regarding destruction of the drugs would be speculative, at best." Mazepink, 987 S.W.2d at 186-87. Connie's "half-step or a step" backwards gave no indication that she was attempting to destroy evidence.

The facts of Park confirm the unreasonableness of the police officers' concerns for destroying evidence and even for their safety. In that case, a police officer wearing plain clothes served a search warrant by knocking on defendant's front door. Park, 528 S.E.2d at 174. When, the defendant answered the door, the police officer stated, "I'm sorry" as if she were suggesting that she had knocked on the wrong door. Id. at 174, 176. The defendant then cast her eyes toward a SWAT team that was assembling outside the

residence. Id. at 174. When the defendant began to shut the front door, the police officer wedged her umbrella in the door frame and forcibly entered the apartment. Id.

Quoting the Virginia Supreme Court, the Virginia Court of Appeals ruled that the shutting of the door did not support an inference that the defendant would retrieve a weapon or destroy evidence:

> "The police did not know where in [defendant's] apartment the drugs would be found. They were not familiar with the interior arrangement of the apartment. They saw no drugs in the possession of any of the occupants as they were seated in the living room. They saw no firearms and had no reason to believe that any would be used by the occupants to the greater peril of the officers if they announced their presence. They had no reason to believe that the occupants were destroying or planning to destroy evidence or that they could have destroyed evidence if the officers had demanded entry before breaking down the door."

Id. at 177 (quoting Heaton v. Commonwealth, 207 S.E.2d 829, 831 (Va. 1974)).

Likewise, the police officers in this case appeared in plain clothes and did not initially disclose their identities. The officers did not see drugs or weapons in Connie's possession or even near her. Like the officers' unfamiliarity with the inside of the apartment in Park, the police in this case had only "limited" information and did not know about any weapons or the location of sinks or bathrooms inside the house. R. 129: 21. The police also had no knowledge that Connie or Mr. Floor possessed weapons or would destroy evidence. Id. at 6, 13, 20-21.

The shutting of the door in Park at the sight of the SWAT team appears to be even

more suspicious than Connie's step backwards. In contrast to the defendant's response in that case, Connie did not move in response to the SWAT team's advances, but, rather, in response to Det. Teerlink's announcing his identity and purpose. Id. at 10-17, 20. The SWAT team remained concealed from Connie's view and only advanced after the announcement. Id. Thus, Connie's minor step was less meaningful than the defendant's conduct in Park when she saw the SWAT team. The step's lack of significance renders the officers' entry unreasonable in violation of constitutional law. 528 S.E.2d at 177; Banks, 540 U.S. at 36.

II. THE POLICE OFFICERS' FORCED ENTRY VIOLATED FUNDAMENTAL RIGHTS AND INTERESTS, THUS REQUIRING SUPPRESSION OF THE FRUITS OF THE ILLEGAL SEARCH.

Because the police officers violated the knock-and-announce rule, this Court must determine the remedy for the officers' illegal entry. Illegal police conduct requires suppression whenever the police violate a person's fundamental rights. Although this Court ruled in Ribe that a violation of the knock-and-announce rule does not require suppression, it rendered that decision before the United States Supreme Court declared that defendants have a constitutional and common law right to require the police to announce their purpose and presence and to wait a reasonable time for a response. But, even under this Court's test for suppression outlined in Ribe, the police officers' blatant disregard for Mr. Floor's rights require suppression.

A. Because the Illegal Entry Below Violated Mr. Floor's Fundamental Right to Be Free From Unreasonable Searches, The Trial Court Must Suppress the Fruits of the Illegal Entry.

Both this Court and the Utah Supreme Court have ruled that illegally executing a search warrant does not require trial judges to suppress the fruits of the illegal search. In Ribe, this Court noted that other courts had held that the knock-and-announce rule "'does not embody a constitutional requirement'" that would require suppression. Id. at 409-10 (quoting United States v. Nolan, 718 F.2d 589, 600 (3rd Cir. 1983)). This Court then quoted the Utah Supreme Court's test for determining whether illegal police conduct required suppression:

> "We have previously held that suppression of evidence is an appropriate remedy for illegal police conduct only when that conduct implicates a fundamental violation of a defendant's rights:
>
> > "Only a 'fundamental' violation of [a rule of criminal procedure] requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards. Where the alleged violation . . . is not 'fundamental' suppression is required only where: (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision of the rule. . . .
> >
> > . . . It is only where the violation also implicates fundamental, constitutional concerns, is

> conducted in bad-faith or has substantially prejudiced the defendant that exclusion may be an appropriate remedy."
>
> [State v. Rowe,] 850 P.2d [427,] 429 [(Utah 1992)] (modifications in original; footnotes omitted) (quoting State v. Fixel, 774 P.2d 1366, 1369 (Utah 1987)).

Ribe, 876 P.2d at 406, 410.

But, one year after this Court's decision in Ribe, the United States Supreme Court specifically ruled for the first time that the knock-and-announce rule "is an element of the reasonableness inquiry under the Fourth Amendment." Wilson v. Arkansas, 514 U.S. 927, 934 (1995). That Court founded its ruling on the common law history of the knock-and-announce rule that dates back to as early as the year 1603. Id. at 931-32. The Court concluded that this history "leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." Id. at 931.

Based on this authority and contrary to Ribe, the knock-and announce-rule "'embod[ies] a constitutional requirement'" that requires suppression. 876 P.2d at 409 (quoting Nolan, 718 F.2d at 600). The United States Supreme Court has declined to address whether a violation of that rule requires suppression. Wilson, 514 U.S. at 937 n.4. Nevertheless, given the high status of the right against unreasonable searches, suppression would appear to be required. The right to be free from illegal searches, including violations of the knock-and-announce rule, ranks as fundamental: "'No right is

held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his [or her] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Moreover, the knock-and-announce rule's common law history establishes that it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Patterson v. New York, 432 U.S. 197, 202 (1977) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); see also Parke v. Raley, 506 U.S. 20, 32 (1992) ("historical tradition [and] contemporary practice" may constitute fundamental rights). The United States Supreme Court ruled almost 50 years ago that the rule is "deeply rooted in our heritage and should not be given grudging application." Miller, 357 U.S. at 313. Thus, in the words of Ribe, suppression is required because a violation of the knock-and-announce rule "renders [a] search unconstitutional under traditional fourth amendment standards." 876 P.2d at 406 (quoting Rowe, 850 P.2d at 429).

In any event, this Court's ruling in Ribe supports finding a violation of a fundamental right in this case. There, two police officers along with members of a police strike force approached the defendant's home to execute a knock-and-announce search warrant. 876 P.2d at 404. As the officers walked to the front door, they saw the defendant standing on the porch outside the front door. Id. When the defendant saw the

officers approaching, he fled from the house. Id. While several officers gave chase, one officer forcibly entered the home without announcing his presence or waiting for any occupants to comply. Id.

This Court ruled that because the police officers executed the warrant "in an unreasonable manner . . . this case implicated a fundamental, constitutional concern and suppression" was, therefore, required. Id. at 413 (footnote omitted). In reaching this conclusion, this Court noted that the police cited no "concern[] for their safety, especially given that the defendant was secured outside the home, or that the evidence was about to be destroyed." Id. at 412 (footnote omitted). Instead, "[t]he police simply failed to knock and wait for any period of time, much less a reasonable period of time." Id. at 413.

The circumstances of this case are equally objectionable. "'Immediate forceful entry is particularly offensive, and indeed, dangerous, when the only reasonably visible officers are in plain clothes.'" Park, 528 S.E.2d at 176 (quoting State v. Ellis, 584 P.2d 428, 431 (Wash. 1978)). Further, the police officers' failure to cite any specific safety concerns or to assert that the waiting requirement risked the destruction of evidence also supports unreasonableness. Moreover, Connie's half or full step backwards raised no safety issues and did not place her in position to destroy evidence. The police simply failed to wait "a reasonable period of time" before entering the residence. Ribe, 876 P.2d at 413. Because the entry was "unreasonable, . . . [it] implicated a fundamental,

constitutional concern" that requires suppression. Id.

B. Suppression is Required Even If the Knock-and-Announce Rule Does Not Implicate Fundamental Rights.

Irrespective of the fundamental nature of the illegal entry in this case, suppression is required under the remaining part of the Ribe analysis. This Court held that analyzing the interests supporting the knock-and-announce rule is "a useful method for assessing Fourth Amendment violations. . . ." Id. at 412. Those interests include the right to privacy in one's home, avoiding violent clashes, and preventing damage to property:

> The interests supporting the knock-and-announce requirement were stated to be "(1) the protection of an individual's private activities within his home, (2) the prevention of violence and physical injury to both police and occupants which may result from an unannounced police entry, and (3) the prevention of property damage resulting from forced entry."

Ribe, 876 P.2d at 406-407 (Utah Ct. App. 1994) (footnote omitted) (quoting State v. Buck, 756 P.2d 700, 701 (Utah 1988)).

Although no property damage resulted from the police officers' illegal entry, the officers' conduct directly implicated the other two interests. First, the police violated Mr. Floor's privacy interests by entering his home, grabbing his wife, and storming the house with over ten officers, including a heavily armed SWAT team. Mr. Floor maintained his privacy interests even though the front door was open when the police arrived. In Ribe, this Court ruled that an open front door or glass panes on a door do not defeat the

expectation of privacy in one's home. Id. at 414. In fact, this Court held that the opportunity to see inside a home "'tend[s] to mitigate, rather than increase, any need for the police to enter without announcing themselves.'" Id. (quoting Commonwealth v. Manni, 500 N.E.2d 807, 808 (Mass. 1986)).

Second, the police officers' failure to wait a reasonable time resulted in one of the very evils that the knock-and-announce rule seeks to avoid, namely, violence. Mr. Floor's efforts to protect Connie illustrates the risks of failing to wait. Although the police officers announced their identities and that they were serving a search warrant, their forcible entry appears to have shocked Mr. Floor, thus, instinctively causing him to protect his wife. Employing this Court's language in Ribe, the officers' entry "'would not have been so abrasive'" had the police waited as required under the knock-and-announce rule. Id. at 410 (quoting Rowe, 850 P.2d at 429) (internal quotation omitted).

This violence presents a strong case for suppression because neither violence nor property damage need actually occur, at all, to implicate the interests supporting the knock-and-announce rule. Rather, that rule's goal is to prevent violence and property damage. Id. at 414. Therefore, police officers undermine that interest even when their conduct "increased the risk of violence at the time of illegal entry even though the risk did not materialize." Id. at 415. Given the struggle that ensued as a result of the police officers' illegal entry, this case presents an even stronger case for suppression than the mere potential but absence of violence found in Ribe.

In addition to an interests analysis, this Court held that "a clear violation of a knock-and-announce statute may still violate constitutional rights. . . ." 876 P.2d at 412. Specifically, "[a] clear violation occurs when the police violate the [knock-and-announce] statute without justification." Id. Utah has codified the knock-and-announce rule in Utah Code Ann. § 77-23-210 (2003). In Ribe, this Court found no justification for failing to wait a reasonable time for a response when "the defendants did not withhold response after the police knocked, the defendants did not know of the officers' purpose, and the officers were not concerned for their safety or that the evidence was about to be destroyed." Id.

These factors applied with equal force to the circumstances below. In addition to the absence of concerns for safety or the destruction of evidence, Connie answered the door and engaged the officers in conversation. The police officers' use of plain clothes was "'particularly offensive'" because it confuses occupants about police officers' identify and purpose. Park, 528 S.E.2d at 176 (quoting Ellis, 584 P.2d at 431). The police added to Connie's confusion when they engaged her in discussion about her lost dog.

Further, even though Connie knew the officers were serving a search warrant, her ambiguous step backwards demonstrated no resistence to the police officers' entry and reasonably may have meant that she was allowing the officers inside the apartment. Because the police officers entered Mr. Floor's residence "without justification," th e

officers "'deliberate[ly] disregard[ed]'" the knock-and-announce rule. Ribe, 876 P.2d at 410, 412 (quoting Rowe, 850 P.2d at 429) (internal quotation omitted). Thus, suppression is required. Id.

CONCLUSION

Mr. Floor requests this Court to reverse the trial judge's denial of his motion to suppress and to order the trial judge to suppress the fruits of the illegal search.

Dated this 21st day of December, 2004.

KENT R. HART
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 21st day of December, 2004.

KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of December, 2004.

_____

ADDENDA

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 031907956 FS
PETE FLOOR, Defendant.	:	Judge: DENNIS M. FUCHS Date: August 16, 2004

PRESENT
Clerk: wendypg
Prosecutor: BOWN, GREGORY L
Defendant
Defendant's Attorney(s): DELLAPIANA, RALPH

DEFENDANT INFORMATION
Date of birth: January 22, 1956
Video
Tape Number: CD #2 Tape Count: 9-30-59

CHARGES

1. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 06/28/2004 Guilty
3. PURCH/POSS DANGEROUS WEAPON - 3rd Degree Felony
Plea: Guilty - Disposition: 06/28/2004 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of PURCH/POSS DANGEROUS WEAPON a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 031907956
Date: Aug 16, 2004

SENTENCE FINE

Charge # 1
Fine: $5000.00
Suspended: $4475.00
Surcharge: $254.73
Due: $525.00

Charge # 3
Fine: $5000.00
Suspended: $4475.00
Surcharge: $254.73
Due: $525.00

Total Fine: $10000.00
Total Suspended: $8950.00
Total Surcharge: $509.46
Total Principal Due: $1050.00
Plus Interest

SENTENCE FINE SUSPENDED NOTE

Fines and Fees to be supervised by AP&P.

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $500.00 Plus Interest
Pay in behalf of: LDA

The amount of Adult Probation & Parole

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 1050.00 which includes the surcharge.
Interest may increase the final amount due.
Pay fine to The Court.

Case No: 031907956
Date: Aug 16, 2004

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.
Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and Parole.
Violate no laws.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Maintain full time employment.

Dated this 16th day of August, 2004.

DENNIS M. FUCHS
District Court Judge
By _____
STAMP USED AT DIRECTION OF JUDGE

ADDENDUM B

77-23-210. Force used in executing warrant — When notice of authority is required as a prerequisite.

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment, or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

ADDENDUM C

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

ADDENDUM D

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.